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NO.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

GULF OIL CORPORATION AND TRAVELERS INSURANCE COMPANY,

Petitioners,

VERSUS

DORIS JEAN FISHER,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

How may a plaintiff identify her claim as maritime under Rule 9(h) of the Federal Rules of Civil Procedure, so as to deprive the defendants of trial by jury?

II.

Once a plaintiff in a maritime case, concurrently within the diversity jurisdiction of the federal courts, has consented to trial by jury, how may she revoke her consent so as to deprive the defendants of trial by jury?

LIST OF PARTIES

Pursuant to Rule 21.1(b) of the Supreme Court of the United States, counsel for petitioners, Gulf Oil Corporation and Travelers Insurance Company, certifies that all parties to this proceeding are:

Doris Jean Fisher

Gulf Oil Corporation

Travelers Insurance Company

Willie Danos

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The opinion of the United States Court of Appeals is reported at 671 F.2d 173 (5th Cir. 1982) and is reproduced as Appendix F.

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on March 31, 1982.

This court has jurisdiction under 28 U.S.C.A. § 1254(1).

RULES INVOLVED

This case involves provisions of Rules 9, 38 and 39 of the Federal Rules of Civil Procedure which read in pertinent part:

Rule 9(h):

> A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of rule 15. The reference in Title 28, U.S.C. §1292(a) (3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision.

Rule 38(b):

Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

Rule 39:

When trial by jury has been demanded as provided in Rules 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

STATEMENT OF THE CASE

Gulf Oil Corporation operated an oilfield in the marshes of southeastern Louisiana. The oilfield was interlaced with navigable waterways. Gulf built a jetty extending from the bank of one of these waterways, into the waterway itself. A pleasure boat, owned and operated by Willie Danos, and in which Doris Jean Fisher, the respondent, was a passenger, struck the jetty on November 11, 1974. Mrs. Fisher was injured.

On November 10, 1975, Mrs. Fisher, a citizen of Louisiana, filed her complaint against Mr. Danos, a citizen of Louisiana, and against Gulf and its insurer, the Travelers Insurance Company, neither of whom was a citizen of Louisiana. The complaint appears as Appendix A to this petition. The only jurisdictional allegation in the plaintiff's complaint was:

V.

> This is a case of admiralty and maritime jurisdiction, as will hereinafter more fully appear, within the meaning of Rule 9(h).

The plaintiff did not demand trial by jury in her complaint.

Later, the plaintiff settled with the non-diverse

defendant, Mr. Danos, and voluntarily dismissed him from the action.

With diversity of citizenship now complete, Gulf and Travelers, with leave of court, amended their answer to allege diversity of citizenship as an additional grounds for federal jurisdiction and demanded trial by jury. The amended answer of Gulf and Travelers, filed by leave of court granted December 3, 1976, is attached as Appendix B.

Counsel for the plaintiff joined in and signed the pre-trial order of January 17, 1978, attached as Appendix C, expressly designating this case as one to be tried by jury. The plaintiff's attorney acquiesced and the district court's minute entry of April 7, 1978, attached as Appendix D, set the case for trial by jury. At no time did the plaintiff ever seek to amend her complaint to identify her *claim* as an admiralty and maritime *claim*.

The case proceeded to trial by jury on April 3, 1980. The jury found for the defendants. The court entered judgment on the verdict on April 10, 1980. The district court's judgment is attached as Appendix E.

The plaintiff appealed to the United States Court of Appeals for the Fifth Circuit. By decision of March 31, 1982, the Fifth Circuit reversed the district court's judgment and remanded to the district court for trial by the judge alone, without a jury. The Fifth Circuit's decision is

attached as Appendix F.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

When the complaint was first filed, the only basis of jurisdiction in the district court was maritime jurisdiction. Once the plaintiff dismissed her demands against the non-diverse defendant, both maritime and diversity jurisdiction existed.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit allowed the plaintiff to deprive the defendants of trial by jury, without following the procedures expressly established by the Federal Rules of Civil Procedure. The Fifth Circuit's opinion, in effect, reads out of the Federal Rules provisions designed to safeguard a litigant's right to trial by jury.

The Seventh Amendment to the Constitution of the United States does not require jury trials in admiralty cases. *Waring v. Clarke*, 5 How. 441, 12 L.Ed. 226 (U.S. 1847). Nor does the Seventh Amendment forbid jury trials in admiralty cases. *Fitzgerald v. United States Lines*, 374

U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963).

In some admiralty cases, a "plaintiff may preclude the defendant from invoking the trial to jury which may otherwise exist." *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 986 (5th Cir. 1978). But there is a "federal policy favoring jury decisions of disputed fact questions", *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 538-39, 78 S.Ct. 893, 2 L.Ed.2d 953, 963 (1958), and the Federal Rules of Civil Procedure describe when and how a plaintiff may deprive a defendant of his hallowed rights to jury trial.

> A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of rule 15. The reference in Title 28, U.S.C. § 1292(3), to ad-

> miralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision.

Fed.R.Civ.P. 9(h).

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

Fed.R.Civ.P. 38(b).

> When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues

> does not exist under the Constitution or statutes of the United States.

Fed.R.Civ.P. 39(a).

This, then, is the procedure for depriving a defendant of a jury trial:

1. The plaintiff files an action which is "within the admiralty and maritime jurisdiction" of the federal district court, and "also within the jurisdiction of the district court on some other ground..." Fed.R.Civ.P. 9(h).

2. The plaintiff identifies the claim as an admiralty or maritime claim. Fed.R.Civ.P. 9(h).

3. If the plaintiff has not so identified his claim in his original pleading, he may do so by amendment. Fed.R.Civ.P. 9(h) & 15.

4. If the defendant has already demanded trial by jury, Fed.R.Civ.P. 38(b), the plaintiff must obtain either the defendant's written stipulation, or an order of court, for trial by the judge alone. Fed.R.Civ.P. 39(a).

The Fifth Circuit allowed frustration of the defendant's right to trial by jury, even though the plaintiff failed to follow this procedure.

This case did not commence as a Rule 9(h) case. The accident in suit may have been within the admiralty and maritime jurisdiction, but that was the only basis of jurisdiciton, because there was not complete diversity when the suit was filed. Rule 9(h) applies only to cases which are within the admiralty and maritime jurisdiction, and "also within the jurisdiction of the district court on some other ground". Fed.R.Civ.P. 9(h). It was only when the plaintiff voluntarily dismissed the non-diverse defendant, Mr. Danos, that this case became a 9(h) case, because it was only then that there was admiralty and maritime jurisdiction, and also "some other ground", diversity. It was not until the non-diverse defendant was dismissed and diversity jurisdiction attached, *Kerr v. Compagnie de Ultramar,* 250 F.2d 860 (2d Cir. 1958); *Mazzella v. Pan Oceanica A/S,* 232 F.Supp. 29 (S.D. N.Y. 1964), that there could even be any consideration of Rule 9(h).

Once Rule 9(h) became applicable with the attachment of diversity jurisdiction, then and only then could the plaintiff make "a statement identifying the claim as an admiralty or maritime claim..." Fed.R.Civ.P. 9(h). The plaintiff's right to a non-jury trial in a 9(h) case is not absolute, but is conditioned upon the plaintiff making a "statement identifying the claim as an admiralty or maritime claim". It is only when the plaintiff has identified her claim as "an admiralty or maritime claim within the meaning of Rule 9(h)" that Rule 38(e) assures her a non-jury trial.

But how does the plaintiff make "a statement identi-

fying the claim as an admiralty or maritime claim"? Every complaint must express the jurisdictional grounds upon which it is based. Fed.R.Civ.P. 8(a). The original complaint alleged only:

V.

> This is a case of admiralty and maritime jurisdiciton, as will hereinafter more fully appear, within the meaning of Rule 9(h).

For the plaintiff to allege that her cause of action is within the admiralty or maritime jurisdiction does nothing more than meet the requirements of Rule 8(a). It demonstrates that Rule 9(h) is inapplicable because there is no other type of jurisdiction. In order to identify the claim as an admiralty or maritime claim, the plaintiff must go beyond the bare allegation of admiralty and maritime jurisdiction. There must exist "some other ground" of federal jurisdiction, and the plaintiff must identify her claim per se as an admiralty or maritime claim.

> An allegation that the claim is within the admiralty and maritime *jurisdiction* does not *automatically* make it an admiralty and maritime *claim*, within the meaning of Rule 9(h), if the claim is also within the jurisdiction of the district court on some other ground. A statement identifying

> the pleading as an admiralty and maritime claim is necessary.

Banks v. Hanover S.S. Corp., 43 F.R.D. 374, 376-377 (D. Md. 1967). In *Banks v. Hanover S.S. Corp.*, the plaintiff in one of the consolidated cases, *Sebree v. Grace Lines*, alleged in the complaint that the case was within federal diversity jurisdiction and within "the Admiralty and Maritime jurisdiction of the court". 43 F.R.D. at 381. This is almost verbatim what the plaintiff in the instant case alleged in her complaint, where in paragraph V she said, "This is a case of admiralty and maritime jurisdiction, as will hereinafter more fully appear, within the meaning of Rule 9(h)." Simply to allege admiralty or maritime jurisdiction does not identify the *claim* as an admiralty or maritime *claim*.

How must the plaintiff identify his claim as an admiralty or maritime claim? An example appears in *Gilmore v. Witschorek*, 411 F. Supp. 491 (E.D. Ill. 1976). There, the plaintiff alleged in his complaint that:

> This is a case of admiralty in [sic] maritime jurisdiction, as hereinafter more fully appears and is an admiralty and maritime claim within the meaning of Rule 9(h), F.R.C.P.

411 F.Supp. at 496. This was held to be sufficient, because not only does it assert admiralty jurisdiction, as does paragraph V of the plaintiff's complaint in this case, it goes

on to identify the *claim* as an admiralty and maritime claim, which the plaintiff's complaint in this case does not do. It is understandable why the plaintiff's complaint in this case does not identify her claim as an admiralty or maritime claim under Rule 9(h), thereby precluding trial by jury. When her case was filed it simply was not a Rule 9(h) case, because the only grounds for federal jurisdiction was admiralty or maritime. The issue of an identifying statement did not even arise until the plaintiff dropped the non-diverse defendant. No sooner did the plaintiff drop the non-diverse defendant than Gulf and Travelers amended their answer to allege diversity jurisdiction and demand trial by jury. As of the time that Gulf and Travelers amended their answer to allege diversity jurisdiction and demand trial by jury, the plaintiff had done nothing to identify her claim as an admiralty or maritime claim even though it was now, for the first time, a 9(h) case. At this time, the plaintiff was obviously content to have her case tried by jury, and her acquiescence in the trial by jury is more than amply borne out by the fact that her attorney signed the pre-trial order of January 17, 1978 (Appendix C) acquiescing in trial by jury.

Though the plaintiff failed to identify her claim as an admiralty or maritime claim once diversity jurisdiction attached and her case was brought within the purview of Rule 9(h), her failure to identify was not irrevocable.

> The choice made by the pleador in identifying or failing to

> identify his claim as an admiralty or maritime claim is not an irrevocable election.

Advisory Committee's Note to Proposed Fed.R.Civ.P. 9(h), 39 F.R.D. 69, 76 (1966). Rule 9(h) provides a very specific procedure whereby a plaintiff may add a statement identifying a claim as an admiralty or maritime claim when he has failed to do so, or whereby he may withdraw such an identifying statement when he has made one. That method is amendment under Rule 15.

> The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15.

Fed.R.Civ.P. 9(h).

Rule 38 permits "any party" to "demand a trial by jury" by serving a demand therefor. Once diversity jurisdiction attached, the defendants in this case demanded trial by jury.

Rule 39(a) provides that once a jury has been demanded, the action "shall be designated upon the docket as a jury action", and all issues shall be tried to a jury unless the parties stipulate otherwise, or unless the court finds that a right to trial by jury does not exist. Fed.R.Civ.P. 39(a).

In *Johnson v. Penrod Drilling Co.*, 469 F.2d 897 (5th Cir. 1972), plaintiffs in a 9(h) case attempted to withdraw a demand for trial by jury, but without complying with Rule 39(a). That is, without the consent of the defendants, and without a finding by the court that a right to trial by jury did not exist. This court ruled that the defendant was entitled to trial by jury, because a demand for trial by jury could be withdrawn only upon compliance with Rule 39(a). The plaintiff in this case did not comply with Rule 39(a), because she did not obtain a stipulation from the defendants that the case may be tried without a jury, and did not seek or obtain an order of court finding that a right of trial by jury did not exist.

Nor did the plaintiff attempt to amend her complaint to add a statement identifying her claim as an admiralty or maritime claim, thereby obviating trial by jury. Addition and withdrawal of identifying statements are "governed by the principles of Rule 15." Fed.R.Civ.P. 9(h). When the plaintiff has included a statement identifying her claim as an admiralty or maritime claim, she may seek leave to amend to withdraw the identifying statement. When the plaintiff has failed to make an identifying statement, she may seek leave to amend to include an identifying statement. But where she does not seek leave to amend, she may not add if she has failed to include, nor may she withdraw if she has included. In *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249 (5th Cir. 1975), a plaintiff had identified his 9(h) claim as an admiralty or maritime claim. He decided later that he wanted a trial by jury, but he never tried to amend

to withdraw his statement identifying his claim under Rule 9(h) as an admiralty or maritime claim. Because he did not try to amend, the plaintiff was forced to a non-jury trial, and the Fifth Circuit affirmed. Withdrawal and addition of identifying statements are both governed under the principles of Rule 15. The plaintiff in this case never identified her claim as an admiralty or maritime claim, but merely invoked admiralty or maritime jurisdiction, which is not tantamount to the requisite identifying statement. *Banks v. Hanover S.S. Corp., supra.* And yet the plaintiff in this case never amended or sought to amend her complaint to identify her claim as an admiralty or maritime claim. She is therefore without standing to insist upon a non-jury trial.

The obvious counter-argument is that the plaintiff's opposition to the defendants' efforts to obtain trial by jury was tantamount to an attempt to amend and add a statement identifying her claim as an admiralty or maritime claim. It is clear that under *Romero v. Bethlehem Steel Corp.* the plaintiff must actually amend. It does not suffice for the plaintiff to insist in a general way upon a non-jury trial or upon a jury trial, whichever is her preference. She must follow the rules.

But assuming arguendo that the plaintiff's opposition to the defendants' efforts to obtain a jury trial was tantamount to an attempted amendment to add a statement identifying her claim as an admiralty or maritime claim, the district court's action in granting the jury trial was tantamount to refusing the attempted amendment.

Amendments are a matter of discretion with the trial court, and abuse of discretion has not been proved or even argued. Moreover, the plaintiff in this case, if her opposition to the trial by jury be considered an attempt to amend, had no purpose in mind other than to deprive the defendants of trial by jury. When the sole purpose of the amendment by the plaintiff is to deprive the defendants of their right to trial by jury, the trial court is within its discretion to refuse the amendment. *Anderson v. American Oil Co.*, 60 F.R.D. 676 (S.D. Ga. 1973); *Banks v. Hanover S.S. Corp.*, *supra*.

In summary, the plaintiff's right to non-jury trial in a 9(h) case is not absolute. It is contingent upon her making a statement identifying the claim as a maritime claim. The plaintiff never made such an identifying claim. The plaintiff never made such an identifying statement in this case. To the contrary, by joining in the pre-trial order, she acquiesced in and consented to trial by jury. She never sought to amend to add a statement identifying her claim as an admiralty or maritime claim. Thus, she never did what she had to do to perfect her right to non-jury trial.

Rule 39(c) provides:

> In all actions not triable of right by a jury...the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Rule 39(c) does not spell out exactly how the parties must consent to trial by jury in actions not triable of right by jury. But it is hard to imagine that the consent of the parties to trial by jury could be more clearly expressed than in the pre-trial order signed by the parties and the court on January 17, 1978. Paragraph 4 of that pre-trial order read:

> The substantive law to be applied is Admiralty. There is diversity of citizenship. Trial will be by jury.

Paragraph 15 of that pre-trial order provided:

> This is ~~(is not)~~ a jury case and a jury trial is ~~(is not)~~ applicable to all aspects of the case.

The plaintiff claims that she unilaterally withdrew this consent to jury trial. Her purported withdrawal had to be unilateral, because the defendants and the court maintained throughout that the case was one for trial by jury. Rule 39(c) contains no provision for withdrawal of consent by one party, once both parties have consented to jury trial. Research reveals no reported decision in point, but it is unthinkable that one party could unilaterally withdraw consent mutually given under Rule 39(c) to jury trial. If one party could unilaterally withdraw her consent given under Rule 39(c) to jury trial, then the provisions of Rule 39(c) would be deprived of all meaning. A reasonable construction of Rule 39(c) is that once given, a party's consent to

jury trial may be withdrawn only with the consent of the other parties or, at the very least with leave of court. In this case, neither the defendants nor the court concurred in the plaintiff's unilateral withdrawal of her consent to trial by jury. Her purported withdrawal of consent to trial by jury is, therefore, ineffective.

Assuming arguendo, therefore, that the plaintiff's action is one "not triable of right by a jury", the district court was correct in ordering the case tried by jury because the plaintiff consented to trial by jury under Rule 39(c) and did not effectively withdraw that consent.

The district court's standard pre-trial notice, which is a part of the record of this case, provides in paragraph 19:

> Hereinafter, this Order will control the course of the trial and may not be amended except by consent of the parties and the Court, or by order of the Court to prevent manifest injustice.

Neither leave of court nor consent of the defendants was ever obtained to eliminate the trial by jury to which the plaintiff had earlier consented.

> Unless and until the Court is persuaded to modify its pre-trial order, the parties are bound by their admissions and stipulations

> included in the order, and may not contradict its terms.

3 Moore, *Federal Practice* 16-42 (2d Ed. 1980).

> The pre-trial order supersedes the pleadings and becomes the governing pattern of the lawsuit. The issues having been thus defined, they ought to be adhered to in the absence of some good and sufficient reason which must rest largely within the discretion of the trial court.

Case v. Abrams, 352 F.2d 193, 195-196 (10th Cir. 1965). The defendants are quick to admit that a pre-trial order may be modified, but it may be modified only by the court and not by the unilateral action of counsel for one of the parties. 3 Moore, *Federal Practice* ¶16.20 (2d Ed. 1980). If the plaintiff could unilaterally modify the pre-trial order without the consent of the defendants or leave of court, she could vacillate daily, and neither the defendants nor the court would know until the last minute how the case was to be tried.

Where the plaintiff has consented to trial by jury, the defendant has a right to trial by jury, even in a 9(h) case. Fed.R.Civ.P. 39(c). Where the plaintiff has not identified her claim as an admiralty or maritime claim, as is the case here, the defendants' demand for trial by jury must be honored. *Banks v. Hanover S.S. Corp., supra.* The plaintiff may, of course, seek to add a statement identifying her

claim as an admiralty or maritime claim, when she has not previously included such a statement. But she must amend to do so, and where she does not try to amend, the defendants' prayer for trial by jury will be honored. See *Romero v. Bethlehem Steel Corp., supra.*

Even construing the pleadings in the light most favorable to the plaintiff, and even assuming that she has sought to amend, the court has quite properly refused leave to amend and has not abused its discretion in so doing.

In summary, where the plaintiff has consented to jury trial under Rule 39(c), and has never made a statement identifying her claim as an admiralty or maritime claim under Rule 9(h), the defendants do indeed have a right to jury trial. Obviously, that right exists when the plaintiff does not oppose it. Even when the plaintiff does oppose the defendants' right to jury trial, the plaintiff's opposition is meaningless unless the plaintiff has included a statement identifying her claim as an admiralty or maritime claim in her complaint, or has amended to include such a statement. She has done neither in this case.

Therein lies the Fifth Circuit's error, and therein lies the reason for granting the writ. The Fifth Circuit allowed the plaintiff to frustrate the defendants' right to trial by jury even though the plaintiff had not followed the rules.

This court has never ruled on the issues at hand.

This court has never squarely decided when and how a plaintiff may identify her claim as an admiralty and maritime claim under Rule 9(h), or withdraw her consent to jury trial. The Fifth Circuit's decision allows the plaintiff to do so without regard to the Federal Rules of Civil Procedure. This erroneous abridgement of the important and federally protected right to trial by jury necessitates that this court grant the writ.

CONCLUSION

For the reasons set forth above, respondents Gulf and Travelers respectfully submit that this court should grant this petition for writ of certiorari.

PHILIP E. HENDERSON
CHARLES HANEMANN
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition For Writ of Certiorari have been sent to each counsel of record for respondent by depositing same in the United States mail, postage prepaid, this _____ day of June, 1982.

I further certify that all parties required to be served have been served.

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